No. 82-1793

IN THE

Supreme Court of the United States

October Term, 1982

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD and DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Petitioners,

vs.

LEWIS-WESTCO & CO.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Wine & Spirits Wholesalers of California ("Wholesalers Association") hereby moves the Court for leave to file a brief *amicus curiae* in support of the Petition for Certiorari herein.[1]

[1]Wholesalers Association sought the consent of the parties to the filing of a brief *amicus curiae* in support of the Petition for Certiorari. Petitioners gave their consent but respondent, Lewis-Westco & Co., refused to consent. A copy of the consent is herewith filed with the Clerk of the Court.

Wholesalers Association is a trade association consisting of twenty-six licensed wholesalers of alcoholic beverages, having places of business located throughout the State of California, that sell approximately 80% of the total distilled spirits sold at wholesale to California retail licensees.[2]

The decision below, *Lewis-Westco & Co. v. Alcoholic Beverage Control Board, et al.*, 136 Cal. App. 3d 829 (1982), held invalid, as preempted by the Sherman Act, Section 24756 of the California Business and Professions Code. The statute requires each distilled spirits wholesaler to post its prices with the Department of Alcoholic Beverage Control and to sell only at the posted prices. The members of Wholesalers Association have a direct interest in the continued validity and enforcement of Section 24756.

Every member of Wholesalers Association has a substantial investment in a wholesale liquor business. Each investment was made, and continues to be made, in reliance upon California's Alcoholic Beverage Control Act, a comprehensive regulatory program governing the distribution and sale of distilled spirits. *See, Cal. Bus. and Prof. § 23000, et seq.; Cal. Bus. and Prof. § 25500, et seq.* (West 1983). The primary value of the price posting requirement to wholesalers is that it makes available current, accurate wholesale price information, which enables them to compete more effectively in the marketplace. In addition, as described in the proposed *amicus curiae* brief appended hereto, the posting of prices enables both the Department of Alcoholic Beverage Control and the wholesalers themselves to detect violations of such provisions of California's Alcoholic Bev-

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[2]Wholesalers Association was denied leave to intervene as a party and participated as *amicus curiae* before both the California Court of Appeal and the Alcoholic Beverage Control Appeals Board in the proceedings below. Appendix A to Petition, at A-6 n. 4.

erage Control Act as (i) Business and Professions Code Section 25503(c) and (d) which prohibit secret rebates and price discrimination, (ii) Business and Professions Code Section 23673, California's price affirmation law, and (iii) California Administrative Code Title 4, Rule 100(k) which prohibits sales below cost. Effective enforcement of these provisions against violators is of substantial importance to the California wholesalers who operate in compliance with such laws.

Although each of the following questions of law is at least mentioned in the Petition for Certiorari, Wholesalers Association respectfully requests leave to file the appended brief *amicus curiae* in order to provide a necessary supplemental analysis of these issues and to emphasize the importance of granting *certiorari* in this case:

1. The decision below is in direct conflict with *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982), because Section 24756 was held invalid even though it neither requires nor authorizes conduct violative of the federal antitrust laws.

2. The decision below is in direct conflict with *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), and *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), all of which upheld analogous price posting statutes applicable to the alcoholic beverage industry, and with *Enrico's v. Rice, et al.*, Civ. No. C-81-0068 EFL (N.D. Cal. Nov. 26, 1982) (mem.) (App. F, A-77 *et seq.*), which held that Section 24756 is not preempted by the Sherman Act.

3. The decision below conflicts with the decisions of this Court and other federal courts holding that unilateral

conduct not involving any contract, combination or conspiracy in restraint of trade does not violate Section 1 of the Sherman Act. *United States v. Parke Davis and Company*, 362 U.S. 30, 37, 45-46 (1960); *Morgan v. Division of Liquor Control*, 664 F.2d 353; *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312; *Enrico's v. Rice*, Civ. No. C-81-0068 EFL; *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Fuchs Sugars and Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979).

4. Section 24756 is valid because it was enacted in the exercise of California's power under the Twenty-First Amendment to regulate the importation, distribution and sale of alcoholic beverages and serves the valid state interests of promoting competition in the industry and aiding in the enforcement of several provisions of California's Alcoholic Beverage Control Act.

5. The price posting statute is valid under the antitrust law exemption of *Parker v. Brown*, 317 U.S. 341 (1943), as elaborated in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Company*, 445 U.S. 97 (1980).

Dated: July 6, 1983.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does the Sherman Act preempt a state statute which neither mandates nor authorizes conduct that violates the antitrust laws?

2. Is a state statute which requires the posting of prices, together with adherence to the posted prices, illegal *per se* under the antitrust laws?

3. Does the Sherman Act invalidate a state statute which requires unilateral price posting and adherence to posted prices by wholesalers of alcoholic beverages, but neither compels nor authorizes them to combine, contract or conspire with each other concerning the prices that are posted and charged?

4. Is California Business and Professions Code Section 24752 valid because it was enacted in the exercise of the State's power under the Twenty-First Amendment to regulate the importation, distribution and sale of alcoholic beverages?

5. Is Section 24756 valid because it falls within the state action exemption from the Sherman Act described in *Parker v. Brown*, 317 U.S. 341 (1943)?

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BRIEF AMICUS CURIAE OF WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Curiae, Wine & Spirits Wholesalers Association of California ("Wholesalers Association"), is a trade association consisting of twenty-six licensed wholesalers of alcoholic beverages, having places of business located throughout the State, that sell approximately 80% of the total distilled spirits sold at wholesale to California retail licensees.[1]

The decision below, *Lewis-Westco & Co. v. Alcoholic Beverage Control Board, et al.*, 136 Cal. App. 3d 829 (1982),[2] held invalid, as preempted by the Sherman Act, Section 24756 of the California Business and Professions Code. The statute requires each distilled spirits wholesaler to post its prices with the California Department of Alcoholic Beverage Control and to sell only at the posted prices. The members of Wholesalers Association have a direct interest in the continued validity and enforcement of Section 24756.

Every member of Wholesalers Association has a substantial investment in a wholesale liquor business. Each investment was made, and continues to be made, in reliance upon California's Alcoholic Beverage Control Act, a comprehensive regulatory program governing the distribution and sale of distilled spirits. *See, Cal. Bus. and Prof. Code § 23000, et seq.; Cal. Bus. and Prof. Code § 25500, et seq.* (West 1983). The primary value of the price posting

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[1]Wholesalers Association sought and was denied leave to intervene as a party and participated as *amicus curiae* before both the California Court of Appeal and the Alcoholic Beverage Control Appeals Board in the proceedings below. Appendix A to Petition, at A-6 n. 4. References hereinafter to the Petition's Appendices are cited as "App." with a designation by letter to the particular Appendix, including, where appropriate, the page number.

[2]The opinion of the Court of Appeal appears as Appendix A to the Petition for Certiorari filed herein with the Court. Citations to that opinion in this brief will be by reference to Appendix A.

requirement to wholesalers is that it makes available current, accurate wholesale price information, which enables them to compete more effectively in the marketplace. In addition, as described below (14-15, *infra*), the posting of prices enables both the Department of Alcoholic Beverage Control and the wholesalers themselves to detect violations of such provisions of California's Alcoholic Beverage Control Act as (i) Business and Professions Code Section 25503(c) and (d) which prohibit secret rebates and price discrimination, (ii) Business and Professions Code Section 23673, California's price affirmation law, and (iii) California Administrative Code Title 4, Rule 100(k) prohibiting sales below cost. Effective enforcement of these provisions against violators is of substantial importance to the California wholesalers who operate in compliance with such laws.

Statement of the Case

Section 24756 of the California Business and Professions Code, referred to herein at times as "the price posting statute", requires each wholesaler of distilled spirits, among others, to file with the California Department of Alcoholic Beverage Control ("the Department") a list setting forth *its own* sales prices of liquor to retailers and to sell to retailers in compliance with *its own* posted price list.[3] The Department has promulgated regulations (Cal. Admin. Code Tit. 4, R. 100), usually referred to as "Rule 100", which set forth the specific procedures to be followed by distilled

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[3]In pertinent part, Cal. Bus. & Prof. Code §24756 provides:

> Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. . . . Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

spirits wholesalers to comply with Section 24756. For instance, all postings are public records (R. 100(g)(2)), and the posting period under Rule 100 currently is one calendar month (R. 100(b)(1)).[4]

This matter originated in a disciplinary action brought by the Department against Respondent, Lewis-Westco & Co., a distilled spirits rectifier/wholesaler licensed by California. The Department charged undisputed violations of Section 24756 and Rule 100 through sales of distilled spirits at other than Lewis-Westco's own posted prices. (App. C) Finding Lewis-Westco guilty, the Department imposed discipline, and its action was affirmed by an order of the Alcoholic Beverage Control Appeals Board ("the Board"). (App. B) Lewis-Westco then brought an original, extraordinary writ proceeding in the California Court of Appeal to review the Board's decision. The Court of Appeal annulled the Board's order on the ground that "the price posting statute must be declared invalid as an illegal restraint of trade." (App. A at A-3, A-10-11) Without so stating, the Court of Appeal necessarily held that the price posting statute is preempted by the Sherman Act under the Supremacy Clause.

The Court of Appeal apparently believed that every state statute requiring price posting and adherence to posted prices

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[4]At the time of the events giving rise to the disciplinary proceeding below, the posting period was two consecutive calendar months. (App. D, A-60) Currently, Rule 100 requires each wholesaler to file and maintain with the Department a new written schedule of prices and quantity discounts every month, on or before the fifteenth day of the month, to become effective on the first day of the following month. (R. 100(a) & (b)(1)) A wholesaler may thereafter reduce its prices to meet competitive prices on the same or competitive brands by filing an amended schedule for the effective posting period. (R. 100(f)) Rule 100 prohibits any wholesaler from advertising or selling at other than its posted price schedule for the posting period. (R. 100(k)) All quantity discounts filed with the Department are deemed published in full to all retailers serviced by the wholesaler licensee if the entire schedule of discounts is advertised in an approved trade journal or industry price book of general circulation. (R. 100(g)(8) & (b)(5))

is illegal *per se* under the Sherman Act. The Court alluded to what it called "the anticompetitive effect resulting from the posting system's facilitation of price fixing among producers" (*Id.* at A-9), and said that "the mandated price posting, coupled with the regulatory compliance condition, openly sanctions and promotes an exchange of price information among competitors calculated to produce a uniform price structure. . . ." *Id.* at A-10.[5]

Summary of Argument

The petition for writ of certiorari should be granted and the decision below reversed for each and all of the following reasons:

First, the decision is in direct conflict with *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982), because the price posting statute was held invalid even though it neither requires nor authorizes conduct violative of the federal antitrust laws. The Court of Appeal cited *Norman Williams* but failed to apply the reasoning of that decision. (App. A at A-7 n. 6)

Second, the decision is in direct conflict with *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), and *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), each of which upheld an analogous price

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[5]The state court also said, "Here, as in *Rice* [21 Cal.3d 431 (1978)], petitioner introduced statistical evidence demonstrating a progressive elimination of price variations between wholesalers selling the same brand and competing brands." *Id.* at A-9. But the court did not say (and the record does not show) that such evidence applied to any but a few brands of gin, bourbon whiskey and scotch whiskey, that the price changes were caused by a contract, combination, or conspiracy among wholesalers, or that price variations would increase if the statute were held invalid.

posting statute applicable to the alcoholic beverage industry. The decision below is also in direct conflict with the decision of the United States District Court for the Northern District of California upholding the validity of the very price posting statute here in issue. *Enrico's v. Rice, et al.*, Civ. No. C-81-0068 EFL (N.D. Cal. Nov. 26, 1982) (mem.) (App. F, A-77 *et seq.*), now on interlocutory appeal to the Court of Appeals for the Ninth Circuit. *Enrico's v. Rice, et al.*, Case No. 82-8138.

Third, the decision conflicts with decisions of this Court and other federal courts holding that unilateral conduct not involving any contract, combination or conspiracy in restraint of trade does not violate Section 1 of the Sherman Act. *United States v. Parke Davis and Company*, 362 U.S. 30, 37, 45-46 (1960); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (price posting statute upheld); *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (price posting statute upheld); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Fuchs Sugars and Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979).

Fourth, the price posting statute is valid because it was enacted in the exercise of California's power under the Twenty-First Amendment to regulate the importation, distribution and sale of alcoholic beverages. In addition, the statute serves the valid state interests of promoting competition in the industry and aiding in the enforcement of several provisions of California's Alcoholic Beverage Control Act.

Fifth, the price posting statute is valid under the antitrust law exemption of *Parker v. Brown*, 317 U.S. 341 (1943), as elaborated in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum Company*, 445 U.S. 97 (1980), because in regulating the sale of alcoholic beverages, the statute

imposes the posting requirement directly rather than through the action of private parties, and the State actively supervises California's price posting policy through consistent enforcement, monitoring of the statute's operation, and modification of the posting requirement from time to time.

Sixth, the decision below casts unjustified doubt upon the legality of the alcoholic beverage price posting statutes of at least seventeen other states[6] and thus threatens disruption of the regulation of the alcoholic beverage industry in those states.

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[6]In addition to California, at least the following seventeen states have alcoholic beverage laws which impose price posting requirements functionally similar to Section 24756: Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Oklahoma, Oregon, South Dakota and Tennessee. In these states, the relevant laws provide for posting of prices for sales from wholesaler to retailer, and/or for sales from manufacturer to wholesaler. See Appendix 1 to this brief for a table listing the various laws.

ARGUMENT

A. The Court of Appeal's Decision Holding California's Price Posting Statute Invalid as an Illegal Restraint of Trade Is Clearly Erroneous in Light of This Court's Decision in *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982).

Again a California Court of Appeal has demonstrated that it simply does not understand the Supremacy Clause or the relationship of the federal antitrust laws to economic regulations enacted by the several states. Although it cited *Rice v. Norman Williams Company*, 102 S. Ct. 3294 (1982) (App. A at A-7 n. 6), the appellate court failed entirely to apply the principles stated in that decision.

In *Rice v. Norman Williams Company*, 102 S. Ct. at 3299, this Court said, "In determining whether the Sherman Act preempts a state statute . . . the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes." The antitrust laws — the relevant federal regulatory scheme in this case — do not preempt the entire field of economic regulation as a federal domain. The Sherman Act proscribes only specified anticompetitive conduct by businessmen — contracts, combinations and conspiracies that unreasonably restrain trade, monopolization, attempts to monopolize and the like. Accordingly, a state regulatory scheme will be adjudged to conflict with the Sherman Act if — *and only if* — the state either *requires* or *authorizes* the very anticompetitive conduct by businessmen which the antitrust laws forbid. This principle was, indeed, precisely the basis of this Court's decision in *Rice v. Norman Williams Company*, 102 S. Ct. 3294, wherein the Court reversed a California Court of Appeal decision invalidating another provision of California's Alcoholic Beverage Control Act. In doing so, the Court said:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it *mandates* or *authorizes* conduct that necessarily constitutes a violation of the antitrust laws *in all cases*, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under §1 of the Sherman Act *when the conduct contemplated by the statute is in all cases a per se violation*. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, *the statute cannot be condemned in the abstract*. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws. *Id.* at 3300 (emphasis added).

Judged by this standard, California's price posting statute clearly does not violate the Sherman Act and thus is not preempted. The statute requires *only* that each wholesaler post *its own* prices for the following month and that the wholesaler adhere to *its own* posted prices for that period. The statute neither requires nor authorizes wholesalers to contract, combine or conspire with each other to fix or affect the prices which they individually will post and charge. If they were to do so, Section 24756 would not insulate their conduct from scrutiny under the Sherman Act. As was said in *Rice v. Norman Williams Company*, in respect of the California designation statute there under review:

> . . . The manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason. There is no basis, however, *for condemning the statute itself* by force of

the Sherman Act. 102 S. Ct. at 3301 (emphasis added).[7]

The decision of the Court of Appeal in this case is so obviously inconsistent with *Rice v. Norman Williams Company* that this Court would clearly be warranted in granting certiorari and reversing the judgment below summarily on the authority of that recent and controlling decision. *See, e.g., Chase Manhattan Bank, N.A. v. Finance Administration of the City of New York*, 440 U.S. 447 (1979); *United States v. Hulley*, 358 U.S. 66 (1958); *District Lodge 34 v. Cavett*, 355 U.S. 39 (1957).

B. The Court of Appeal's Condemnation of the Price Posting Statute Conflicts With Decisions of This Court and Other Federal Courts Upholding Analogous Statutes.

This Court and other federal courts have upheld analogous price posting statutes applicable to the sale of alcoholic beverages. In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), this Court held valid, as against an attack based, *inter alia*, on Sherman Act grounds, a New York statute which required distillers to file with the State Liquor Authority monthly price schedules for sales to New York wholesalers and retailers. The statute also required that the filing be accompanied by an affirmation that the prices posted were no higher than the lowest prices at which

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[7]In *Rice v. Norman Williams Company*, 102 S. Ct. at 3300, the Court also said that "It is irrelevant for our purposes that the distiller's ability to restrict intrabrand competition in California has the imprimatur of a state statute." The Court added the following in a footnote:

> This is merely another way of stating that the designation statute might have an anti-competitive effect when applied in concrete factual situations. See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 110-111, 58 L.Ed.2d 361, 99 S. Ct. 403, 412-413 (1978). We have explained, however, that *this is insufficient to declare the statute itself void on its face. Id.* at 3300 (emphasis added).

sales were made anywhere in the United States during the preceding month. Thus, as the Court there stated: ". . . a brand owner doing business in New York must keep himself informed of the prices charged by 'all related persons' throughout the United States." *Id.* at 41. Distillers were also required to sell at the posted prices. The Court nevertheless held that there was no conflict between the New York statute and the Sherman Act.

In *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), the Court of Appeals for the Second Circuit upheld Connecticut statutes which, like California's price posting law, required each alcoholic beverage manufacturer and wholesaler to *post its own prices* in advance for each month and to *individually adhere to those prices* for the posted month. The Court of Appeals rejected a Sherman Act challenge to the Connecticut law because the statutes did not "authorize or compel private parties to enter contracts or combinations to fix prices in violation of Section 1 of the Sherman Act." *Morgan v. Division of Liquor Control*, 664 F.2d at 355. In *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. 1312 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), the District Court upheld, as not violative of the antitrust laws, Connecticut's beer price affirmation and posting statute, which required adherence to posted prices during the effective monthly period for posting.

After the decision in *Lewis-Westco* was entered and was brought to its attention, the District Court for the Northern District of California held in *Enrico's v. Rice, et al.*, Civ. No. C-81-0068 EFL (N.D. Cal. Nov. 26, 1982) (mem.), that California's price posting statute does *not* violate Section 1 of the Sherman Act. (App. F) An interlocutory appeal from this decision is pending before the Ninth Circuit Court of Appeals and is scheduled for argument on July 12, 1983.

Enrico's v. Rice, et al., Case No. 82-8138 (U.S.C.A. 9th Cir.).[8]

C. California's Price Posting Statute Does Not Violate the Sherman Act Because It Requires Only Unilateral Conduct by Each Distilled Spirits Wholesaler.

Section 1 of the Sherman Act proscribes only a "contract, combination . . . or conspiracy in restraint of trade . . . ." 15 U.S.C. § 1. Section 1 does not apply to *unilateral* conduct — much less unilateral conduct ordered by the State through a sovereign act of government.[9] A Section 1 violation, like other illegal conspiracies, requires a *plurality* of participants and an *agreement* among them. *United States v. Parke Davis and Company*, 362 U.S. 30, 37, 45-46 (1960); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 (9th Cir. 1979); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.* 602 F.2d 1025, 1029 (2d Cir. 1979), *cert. denied*, 444 U.S. 917 (1979). The California Court of Appeal failed to address or apply these long-established principles in this case.

California's price posting statute does not violate the Sherman Act because it neither requires nor authorizes any wholesaler to enter into a contract, combination or conspiracy in restraint of trade. Section 24576 and Rule 100

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[8]Even the voluntary exchange of price information pursuant to an agreement among competitors is not *per se* illegal, but must be adjudged under the rule of reason. *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86, 113 (1975); *United States v. United States Gypsum Company*, 438 U.S. 422, 441, n. 16 (1978); *Maple Flooring Mfrs. Ass'n. v. United States*, 268 U.S. 563 (1925). The view expressed in these judicial decisions finds support in scholarly discussion of the subject. Posner, "*Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*," 67 Geo. L.J. 1187 (1979).

[9]Furthermore, as discussed in Part E, *infra*, pp. 15-16, the prohibitions of the Sherman Act do not apply to sovereign state action like that manifested in California's price posting law.

require only that each wholesaler post *its own* prices for *its own* products and adhere to *its own* prices for one calendar month after they become effective. Such unilateral action, if engaged in by individual wholesalers without the compulsion of state law, would not violate Section 1 of the Sherman Act.

In *Morgan v. Division of Liquor Control*, 664 F.2d at 353, and *U.S. Brewers Ass'n., Inc. v. Healy*, 532 F. Supp. at 1312, the courts upheld Connecticut price posting statutes on the ground that they required only unilateral conduct and did not compel or authorize private parties to contract or combine to fix prices in violation of Section 1 of the Sherman Act.

It necessarily follows that the Court of Appeal erred when it held that "the price posting statute must be declared invalid as an illegal restraint of trade" even though only unilateral conduct of wholesalers is required by the statute (App. A at A-10-11). This was, indeed, one of the principal bases upon which the United States District Court for the Northern District of California declined to follow *Lewis-Westco* and instead held that the California price posting statute does *not* violate the antitrust laws. In its Memorandum of Decision (App. F, A-77 *et seq.*) the Court said, *inter alia*:

> A violation of Section 1 of the Sherman Act cannot be based on unilateral action. *United States v. Colgate & Co.*, 250 U.S. 300, 305-6 (1919); Sullivan, *Antitrust*, p. 311 (1977). The section condemns concerted activity only . . . . [citing *Morgan, supra.*] *Id.* at A-81.
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> * * *
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> . . . Rule 100 mandates only unilateral action by each liquor wholesaler, *independent activity insufficient to constitute a Section 1 violation. Id.* at A-83 (emphasis added).

The District Court's analysis is sound and its rejection of the specious reasoning of *Lewis-Westco* should be adopted by this Court.

D. California's Price Posting Statute Is Valid Because It Falls Within the Regulatory Powers of California Under the Twenty-First Amendment.

That the several states have very broad power to regulate the importation, distribution and sale of alcoholic beverages is not subject to dispute. *See, e.g., California Retail Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). California's price posting statute, enacted in the exercise of that power, is therefore valid even if — contrary to the argument presented above — the statute would otherwise violate the antitrust laws. Moreover, even if the reconciliation of federal and state interests described by the Court in *Midcal* (445 U.S. at 110) were applicable here, the statute would be valid because it serves a number of important state interests which outweigh the statute's marginal impairment, if any, of antitrust policy.

Promotion of Competition. The price posting statute promotes competition in the distilled spirits wholesaler-retailer market by assuring the dissemination of reliable and conveniently available price information to wholesalers and their retail customers. Both courts and scholars have recognized the pro-competitive value of such information. *See, supra*, note 8, at 11. In addition, price posting enhances competition because it facilitates "pool buying" by groups of small retailers. California's "pool buying" statute (Cal. Bus. & Prof. Code §24400) permits retailers to combine their purchases to take advantage of quantity discounts. This helps to preserve a competitive market structure against the

encroachment of monopolization efforts at the retail and wholesale levels of distribution. Without the price and quantity discount information made available by the statute, pool buying would be much less effective.

Aid to Enforcement of Regulations. The dissemination of price information required by the statute aids the enforcement of other provisions of California's Alcoholic Beverage Control Act. For example, Section 25503 of the Business and Professions Code prohibits, among other things, secret rebates (subparagraph (c)) and price discrimination (subparagraph (e)) in respect of alcoholic beverages. The disclosure required by the posting laws facilitates efforts by the Department and the industry to detect violations of these provisions. When the Department learns of prices being offered by a retailer that appear to be inordinately low in relation to cost, reference can be made to wholesalers' posted prices to determine whether there is so small a margin between those prices and the retailer's prices as to create a reasonable suspicion that the retailer is the recipient of secret rebates or favorable discriminatory pricing. Victims of unfair trade practices are better alerted to discriminatory pricing if they know the posted price at which all transactions should take place. Public disclosure of prices under the posting law reduces opportunities for exploitation of market power and secret collusion in derogation of competition. *See, Posner*, 67 Geo. L.J. at 1197-1198; 2 *Von Kalinowski*, "Antitrust Laws and Trade Regulation," §6I.06[2] at 6I-43 (1982).

The price posting statute also facilitates administration of California's Alcoholic Beverage Control Act in other respects. Rule 100(k) prohibits sales below a seller's cost and Section 23673 of the Business and Professions Code (price affirmation law) requires manufacturers to sell liquor to wholesalers in California at a price no higher than that

offered elsewhere in the nation. The disclosures required by Section 24756 and Rule 100 are of substantial assistance in the enforcement of these laws. The ready availability of accurate price information through posting permits convenient comparison of prices and thus makes detection of illegal activity more likely and less costly, thereby encouraging members of the industry to compete only in lawful ways. The State has a legitimate interest in regulating commerce in liquor to assure compliance with its laws. *See, e.g., Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 282-83 (1972); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 139 (1939).

Because the price posting statute relates to the distribution and sale of alcoholic beverages and serves a variety of California's regulatory and economic interests with respect thereto, the statute falls well within the regulatory power of California under the Twenty-First Amendment.

E. California's Price Posting Statute Falls Within the State Action Exemption of *Parker v. Brown*, 317 U.S. 341 (1943).

Section 24756 and Rule 100 are valid because they constitute sovereign state action and therefore fall within the state action exemption from the Sherman Act first recognized by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). In *California Retail Liquor Dealer Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court, after reviewing its state action exemption decisions subsequent to *Parker*, said:

> These decisions establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the state itself. . . .

Id. at 105.

California's price posting statute clearly meets both of these requirements. The price posting policy is "clearly articulated and affirmatively expressed" in Section 24756 and that policy is supervised by California, acting through its Department of Alcoholic Beverage Control.

The State itself has decided that there will be both posting of prices and adherence to those prices. Moreover, the State determines the length of time for which adherence is required, and imposes both the posting and adherence requirements directly rather than through the action of private parties. Unlike the circumstances of *Midcal, there is no private exercise of economic power with respect to third persons which the State needs to supervise.* Therefore, the statute falls within the core of the state action exemption of *Parker v. Brown* as a matter of law.

Moreover, the Department actively administers and enforces the price posting law, monitors its operation, and holds hearings to determine whether Rule 100 should be revised. This is surely "active supervision by the State" within the meaning of *Midcal* and constitutes the kind of "pointed re-examination by the policy maker" which was held in *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977), to satisfy the "active supervision" requirement of the state action exemption. *Cf. Morgan v. Division of Liquor Control*, 664 F.2d at 356, where the court found active state supervision of Connecticut's price posting statute in the fact that the legislature frequently re-examined the operation of the price posting system.

Conclusion

Amicus Curiae submits that for the reasons set forth above the Petition for Writ of Certiorari herein should be granted.

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Respectfully submitted,

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APPENDIX 1.
Price Posting Laws

A. *Sales from Wholesaler to Retailer:*

1)	Connecticut:	Conn. Gen. Stat. § 30-68 (1982) Conn. Gen. Stat. § 30-63 (1982)
2)	Delaware:	Del. Regs. Rule 29, Liquor Cont., L. Rep. (CCH) Para. 4104 (August 30, 1981)
3)	Georgia:	Ga. Admin. Comp. Ch. 560-2-3-45 (1982)
4)	Hawaii:	Hawaii Rev. Stat. § 281-43 (1955)
5)	Maryland:	Md. Ann. Code art. 2B, § 109 (1967)
6)	Minnesota:	Minn. Stat. § 340.983 (1975)
7)	Missouri:	Mo. Rev. Stat. § 322.332 (1978)
8)	Nebraska:	Neb. Rev. Stat. §§ 53.168.01-.03 (1981)
9)	New Jersey:	N.J. Rev. Stat. § 54:45-1 (1955)
10)	New York:	N.Y. Alcoholic Beverage Control Law § 101-b(3)(b) (McKinney 1979)
11)	Oklahoma:	Okla. Alcoholic Bev. Cont. Board Regs., Liquor Cont. L. Rep. (CCH) Para. 4049 (October 15, 1976)
12)	Oregon:	Or. Admin. R. 845-10-210 (1977)
13)	South Dakota:	S.D. Admin. R. 64:75:03:02 (1976)
14)	Tennessee:	Tenn. Code Ann. § 57-6-104(a) (1974)

B. *Sales from Manufacturer to Wholesaler:*

1)	Connecticut:	Conn. Gen. Stat. § 30-63 (1982)
2)	Delaware:	Del. Code Ann. tit. 4, § 508 (1953)
3)	Florida:	Fla. Stat. Ann. § 565.14 (West 1981)
4)	Hawaii:	Hawaii Rev. Stat. § 281-43 (1955)
5)	Kansas:	Kan. Stat. Ann. § 41-1101 (1979). Kan. Admin. Regs. 14-4-7(e) (1980) Kan. Admin. Regs. 14-4-11(a) (1981)
6)	Maryland:	Md. Ann. Code art. 2B, § 109 (1967)
7)	Massachusetts:	Mass. Gen. Laws Ann. ch. 138, § 25B (West 1970) Mass. Gen. Laws Ann. ch. 138, § 25C (West 1970)
8)	Nebraska:	Neb. Rev. Stat. §§ 53.168.01-.03 (1981)
9)	New Jersey:	N.J. Rev. Stat. § 54:45-1 (1955)
10)	New Mexico:	N.M. Stat. Ann. § 60-8A-13-12 (1981)
11)	New York:	N.Y. Alcoholic Beverage Control Law § 101-b(3)(a) (McKinney 1979)
12)	Oklahoma:	Okla. Alcoholic Bev. Cont. Board Regs., Liquor Cont. L. Rep. (CCH) Para. 4047 (April 18, 1980)
13)	Oregon:	Or. Admin. R. 845-10-210 (1977)